PP v. MOHD ARABI AMINUDDEN

HIGH COURT MALAYA, KOTA BHARU
AHMAD BACHE JC
[CRIMINAL APPEAL NO: 41LB(A)-1-1-2016]
31 JULY 2017

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 15(1)(a) – Self-administration of dangerous drugs – Procedure for collecting urine sample – Whether in accordance with procedure and existing law – Test used – Screening test and clinical or confirmation test – Whether in conformity with administrative guidelines in IGSO F103 item 8 of Drug Dependants (Treatment and Rehabilitation) Act 1983 and KKM Guidelines Bilangan 6/2000 – Court of Appeal decision in Noor Shariful Rizal Noor Zawawi v. PP – Whether applied retrospectively – Whether binding – Whether administrative guidelines have force of law – Whether correct procedure used – Whether charge against accused proven*

CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal and discharge – Dangerous Drugs Act 1952, s. 15(1)(a) – Self-administration of dangerous drugs – Magistrate grounded finding to acquit and discharge based on contradicting evidence of defence and prosecution – Whether contradictions in evidence of defence and prosecution inevitable – Whether Magistrate erred – Whether gave rise to misdirection which warranted intervention – Whether conviction ought to be set aside*

CRIMINAL PROCEDURE: *Sentencing – Dangerous drugs – Self-administration of dangerous drugs – Court embarked on balancing exercise between justice to accused and pubic interest – Mitigating factors – First offender, young and served in police force for 14 years – Whether a fine most appropriate – Whether binding over or custodial sentence would be excessive*

The respondent ('accused'), a policeman, was charged to have self-administered dangerous drugs, an offence under s. 15(1)(a) of the Dangerous Drugs Act 1952 and punishable under the same section. The Magistrate made a finding of fact that there was no break in the chain of evidence and was satisfied that all the procedures had been properly complied with and that the urine sample of the accused did not get mixed up with urine samples of other persons. The Magistrate also found that the evidence of the prosecution witnesses were rational, acceptable and consistent. Having subjected the prosecution's evidence to a maximum evaluation, the Magistrate found that the prosecution had successfully proved and made out a *prima facie* case and called the accused to enter his defence. The accused, in his defence, denied the prosecution's evidence and contended that there was a break in the chain of evidence and that there was a mix-up of the urine samples which rendered the result of the analysis to

A be highly doubtful and unreliable. At the end of the defence case, the Magistrate found that the accused had succeeded in raising a reasonable doubt in the prosecution's case and that the prosecution had failed to prove its case beyond reasonable doubt. Hence, the accused was acquitted and discharged at the end of the defence case. Dissatisfied, the respondent B appealed. The questions of law posed for the court's determination were (i) whether the taking of the urine sample of the accused was in accordance with the procedure and the existing law; and (ii) whether the court could impose a sentence without any record of conviction.

Held (allowing appeal):

C **(1)** The evidence of the prosecution witnesses was reliable and consistent and there was no break in the chain of evidence regarding the movements of the bottle containing the urine sample of the accused. After subjecting the evidence of the prosecution to strict scrutiny, and upon maximum evaluation, the court was satisfied with the finding of D the Magistrate that a *prima facie* case was successfully proved by the prosecution. (para 28)

(2) It is trite that in almost all cases, the evidence of the defence would be significantly different from that of the prosecution in that, it will invariably be in contradiction with that of the prosecution. Hence, it was E manifestly clear that the Magistrate fell into error when he grounded his finding to acquit and discharge the accused based solely on the contradicting evidence of the defence with that of the prosecution. Such contradictions in themselves could not and would never result in the accused/respondent being able to raise a reasonable doubt on the F prosecution's case. (paras 34 & 36)

(3) At the end of the defence case, the Magistrate must subject the evidence of the prosecution to a maximum evaluation, and thereafter, test the defence evidence with the evidence of the prosecution to determine which evidence was more probable and to finally determine whether G that probability can raise a reasonable doubt on the case of the prosecution. The Magistrate did not direct his mind in accordance with the well established principle, hence, giving rise to a misdirection which warranted intervention. Had the Magistrate analysed critically by weighing in on the evidence of the accused with that of the prosecution H witnesses, he would have maintained his earlier finding at *prima facie* stage. (paras 37 & 39)

(4) The evidence of the accused was not probable compared to the strong overwhelming evidence of the prosecution. The accused had all the motive to lie in the court compared to the prosecution witnesses who I were made up of police personnel and had no personal interest

whatsoever. The motive of the accused was only to blacken their credibility as much as possible in order to earn an acquittal. The Magistrate misdirected his mind when he failed to take this factor into consideration. Further, it was unnecessary to invoke s. 114(g) of the Evidence Act 1950 against the prosecution for failing to call one Corporal Nazri, who escorted the accused together with SP1 to take the urine sample, as his evidence would be the same as that of SP1. The Magistrate had already satisfied himself at the prosecution's case that the ingredients of the charge were already made out, even without calling Nazri. Hence, the Magistrate erred when he wrongly invoked an adverse inference against the prosecution. (paras 41 & 43)

(5) The defence of the accused was a bare denial which could not dislodge the overwhelming evidence of the prosecution against the accused. The accused had failed to raise a reasonable doubt in the case of the prosecution and therefore the prosecution had successfully proven its case beyond reasonable doubt. Hence, the accused was found guilty and convicted and the decision of the Magistrate was set aside. (para 44)

(6) The procedure used was right, and there was no break in the chain of evidence. The test used was firstly, the screening test and, secondly the 'clinical test or confirmation test' *ie*, analysis by the chemist. In this case, the urine sample subjected to both tests was from the one and same bottle of urine sample. The court took cognisance of the judgment in *Noor Shariful Rizal Noor Zawawi v. PP* ('*Noor Shariful Rizal*') wherein it was decided that two separate urine samples in two separate bottles were to be used for each test as this was in conformity with two administrative guidelines *ie*, IGSO F103 item 8 of the Drugs Dependants (Treatment and Rehabilitation) Act 1983 and KKM Guidelines Bilangan 6/2000. The Court of Appeal in the case decided that the two administrative guidelines have the force of law. (paras 46 & 47)

(7) However, the decision of the Court of Appeal did not bind this case as it was heard earlier on 20 December 2015 whilst the decision in *Noor Shariful Rizal* was heard on 22 February 2017. Further, the offence in the instant case was committed on 30 October 2013, well before the decision in *Noor Shariful Rizal*. The decision in *Noor Shariful Rizal* did not have retrospective ruling but applied prospectively for the reason that, if it were to have a retrospective effect, all the convictions or acquittals before *Noor Shariful Rizal* would become a nullity and this would cause chaos in the justice system. If the court in *Noor Shariful Rizal* had wanted its ruling to be retrospective, it would have so mentioned in clear terms. (paras 51 & 53)

(8) It is trite that a High Court, in an appeal, and after satisfying itself that the order of acquittal by a lower court was wrong, will have to substitute the acquittal, and to record a conviction. It is only upon a conviction that a sentence is to be passed. In meting out the sentence, the court had to strike a balance in order to do justice to the accused and to the public. The court embarked on a balancing exercise, by balancing the public interest with the factors that the accused is young, a sole breadwinner, has two small children, one of whom was a newborn, and that both children need the fatherly love and affection, a first offender, who had served in the police force for 14 years and had been awarded with various awards. In the circumstances of the case, a fine was most appropriate and the accused was accordingly sentenced to a fine of RM3,500 and in default eight months imprisonment. (paras 54, 61 & 62)

Case(s) referred to:

Mamat Daud & Ors v. The Government of Malaysia [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197 SC ***(refd)***

Mat v. PP [1963] 1 LNS 82 HC ***(refd)***

Noor Shariful Rizal Noor Zawawi v. PP [2017] 4 CLJ 434 CA ***(not foll)***

PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(foll)***

PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***

PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***

PP v. Mohd Bandar Shah Nordin & Anor [2008] 4 CLJ 859 CA ***(refd)***

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

PP v. Mohd Rosidi Mat Amin [2015] 6 CLJ 511 HC ***(refd)***

R v. Ball [1951] 35 CR App 164 ***(refd)***

Repco Holdings Bhd v. PP [1997] 4 CLJ 740 HC ***(refd)***

Prasit Punyang v. PP [2014] 7 CLJ 392 CA ***(refd)***

Tan Sri Abdul Rahim Mohd Noor lwn. PP [2001] 1 CLJ 645 HC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 173A

Dangerous Drugs Act 1952, s. 15(1)(a)

Evidence Act 1950, s. 114(g)

For the prosecution - Nooriah Osman; DPP

For the accused - Mohd Faizal Hazim Abdul Rahman & Wan Mohd Ikram Wan Ibrahim; M/s Faizal Ikram & Co

Reported by S Barathi

JUDGMENT

Ahmad Bache JC:

Background

[1] The accused/respondent, a policeman, was charged to have self-administered dangerous drugs, an offence under s. 15(1)(a) of the Dangerous Drugs Act 1952 (Act 234) punishable under the same section.

[2] At the end of the defence case, the learned trial Magistrate acquitted and discharged the accused/respondent. Dissatisfied, the Public Prosecutor filed an appeal before this court.

[3] Having heard the submissions of both parties, this court allowed the appeal by the Public Prosecutor/appellant, set aside the findings of the Magistrate, and found the accused/respondent guilty, and convicted as well as sentenced him to a fine of RM3,500, in default eight months imprisonment.

[4] Dissatisfied, the accused/respondent filed a notice of appeal to the Court of Appeal.

[5] These are the grounds of decision of this court.

The Charge

[6] The charge against the accused/respondent was as follows:

> Bahawa kamu pada 30/10/2013 jam lebih kurang 16.30 hrs bertempat di tandas Balai Polis Kok Lanas di dalam daerah Kota Bharu dalam Negeri Kelantan telah memberikan kepada kamu sendiri jenis dadah yang mengandungi "methamphetamine". Oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 15(1)(a) Akta Dadah Berbahaya 1952.

The Brief Facts

[7] The brief facts of the case were as follows:

On 30 October 2013 at about 3.15pm, SP5 who headed a raiding team raided an unnumbered house at Jalan Tok Akil, Membatu, Kok Lanas, in the District of Kota Bharu, where the accused/respondent was arrested.

[8] In the search that was carried out, nothing incriminating was found on the person of the accused. He was then brought to Kok Lanas Police Station at 4.30pm. Subsequently, according to SP5, with the assistance of SP1 and Corporal Nazri, a preliminary screening of the urine test of the accused/respondent was carried out and the result of the urine test was positive with methamphetamine. It must be stated here that the accused/respondent gave his urine sample voluntarily. The screening test was conducted in front of the accused/respondent. The bottle was then sealed and a label with the name of the accused/respondent was affixed to the bottle.

[9] SP5 then handed over the bottle to Inspector Khairul Azmi (SP6), the investigating officer ("the IO") of this case who, thereafter, kept it in his locked steel cabinet which nobody else has access to.

[10] The next day, SP6 handed the said bottle containing the urine sample, with the Form POL 31 (P6), of the accused/respondent, to SP2 who thereafter handed it over to SP3, the chemist at the Chemistry Department.

[11] Upon analysis by SP3, assisted by SP4, it was confirmed that the urine sample contained the drug of methamphetamine. Hence, the charge against the accused/respondent.

Question Of Law Raised

[12] The question of law raised were as follows:

(i) Sama ada pengambilan sampel air kencing untuk ujian di bawah seksyen 15(1)(a) Akta Dadah Berbahaya 1952 adalah teratur di sisi undang-undang berdasarkan keadaan yang wujud dalam kes ini.

(ii) Sama ada Mahkamah Tinggi boleh menjatuhkan hukuman terhadap responden tanpa terdapatnya rekod tentang sabitan.

Findings Of The Magistrate

[13] The learned Magistrate had made a finding of fact that, on a maximum evaluation, the prosecution had successfully proved a *prima facie* case hence the accused/respondent was ordered to enter his defence.

[14] The learned Magistrate had made a finding of fact that there was no break in the chain of evidence and, that the bottle, containing the sample was the same bottle that was given by SP5 that contained the urine sample of the accused/respondent, as confirmed by the two chemists, SP3 and SP4. On that ground, the learned Magistrate was satisfied that all the procedures had been properly complied with and that the urine sample of the accused/respondent did not get mixed up with urine samples of other persons.

[15] The learned Magistrate also made the finding that the evidence of the prosecution witnesses were rational, acceptable and consistent. This court referred to the findings of the learned Magistrate as found at pp. 13 and 14 of the appeal record:

> Mahkamah di dalam hal ini berpendapat bahawa isu-isu di atas adalah tidak material kerana perkara penting yang patut dibincangkan adalah tentang ketulinan barang kes iaitu sampel urine itu sendiri, adakah ia milik OKT atau telah tertukar dengan sampel urine orang lain? Jika pihak pendakwaan boleh membuktikan ianya milik OKT dan tidak tertukar dengan orang lain, maka ia patut diterima oleh mahkamah sebagai bukti yang sah dalam memanggil OKT membela diri. Ini kerana mahkamah mendapati prosedur analisa yang telah dijalankan oleh ahli kimia terhadap sampel urine yang dihantar oleh pihak polis adalah prosedur yang betul dan tidak perlu dipertikaikan. Mahkamah juga mendapati ianya tidak dipertikaikan oleh pihak pembelaan. Mahkamah juga mendapati siasatan oleh pegawai penyiasat adalah lengkap dan memadai.
>
> Pada peringkat ini mahkamah juga berpendapat bahawa keterangan saksi-saksi pendakwaan adalah munasabah dan boleh diterima. Seterusnya, mahkamah ini ingin menyatakan bahawa keterangan saksi-saksi pendakwaan adalah konsisten.

Begitu juga SP5 selaku pegawai serbuan tidak pernah mengenali OKT sebelum ini. Oleh itu tiada sebab untuk SP5 menganiaya dan mengkhianati OKT. Tiada motif untuk SP5 berbuat sedemikian terhadap OKT.

[16] Having subjected the prosecution's evidence to a maximum evaluation, the learned Magistrate found that the prosecution had successfully proved and made out a *prima facie* case.

[17] The accused was called to enter his defence, in which the accused denied the prosecution's evidence and, in addition to that, contended that there was a break in the chain of evidence and that there was a mixed-up of the urine samples rendering the result of the analysis to be highly doubtful and unreliable.

[18] The learned Magistrate thereafter, made the following finding and said at p. 22 of the appeal record:

[13] Mahkamah mendapati bahawa versi keterangan OKT adalah sangat berbeza dengan versi keterangan yang dikemukakan oleh saksi-saksi pendakwaan terutamanya keterangan SP1, SP5 dan SP6. Sepertimana yang mahkamah nyatakan di atas bahawa ketiga-tiga saksi ini adalah saksi-saksi yang material. Terdapat ketidaksamaan versi antara versi OKT dan saksi-saksi pendakwaan ini terutamanya ketika berlakunya proses tangkapan OKT, ketika mana proses pengambilan ujian awal sampel air kencing OKT termasuk prosedur-prosedur pegambilan urine, sehingga proses penandaan dan "seal" botol urine yang dilakukan oleh pihak polis terhadap tahanan termasuk OKT.

Atas sebab itu pelbagai kemungkinan boleh berlaku. Antaranya kemungkinan berlakunya pertukaran botol air kencing milik OKT dengan botol air kencing milik orang lain yang ditangkap bersama dengan OKT atas kegagalan pihak polis melaksanakan proses ujian air kencing dengan betul sepertimana yang telah dinyatakan oleh OKT di dalam keterangan beliau.

[19] At the end of the defence case, the learned Magistrate found that the accused had succeeded in raising a reasonable doubt in the prosecution's case and therefore that the prosecution failed to prove its case beyond reasonable doubt. The accused/respondent was thereafter acquitted and discharged.

Analysis And Findings Of This Court

On The Issue Of Prima Facie Case

[20] On the issue of *prima facie*, this court agreed with the findings of the learned Magistrate that, as all the ingredients of the charge were successfully proved, and the proper procedures were complied with, thus a *prima facie* case was successfully made out.

[21] It was the prosecution's case that the screening test that was conducted by SP5 (SI Bustamam) and assisted by SP1 (Sargeant Major Mohamad Zabidi) and Corporal Nazri, by dipping the test strip in the bottle containing the urine of the accused/respondent. The test was done in the presence of the accused which confirmed that there was a presence of methamphetamine in the urine sample of the accused/respondent.

[22] SP5 then closed the bottle, sealed it and affixed a label on the same bottle with the name of the accused on it. Thereafter, SP5 brought the bottle to the Ibu Pejabat Daerah Kota Bharu and made a police report. He also affirmed that the consent form to give the urine sample (P1) was filled up and signed by the accused voluntarily. SP5 then handed the bottle containing the urine sample of the accused to SP6, the IO, who then kept in his steel cabinet under lock and keys which was not accessible to anyone.

[23] The evidence of SP5 can be found at pp. 72 and 73 of the appeal record:

> Pada jam 4.30 p.m tarikh yang sama saya dibantu anggota serbuan telah jalankan ujian awal ke atas air kencing penama dan dapati positif dadah jenis methamphetamine …
>
> Pemeriksaan awal penama dibuat di BP Kok Lanas. Sebelum pemeriksaan dilakukan kami telah beri botol yang berseal di dalam sampul yang ada siri nombor untuk dibuat pilihan oleh penama. Kemudian penama telah diescort untuk Det SM Mohd Zabidi (SP1) dan Kop Nazri ke tandas BP Kok Lanas. Setelah proses pengambilan air kencing dilakukan, penama dibawa oleh anggota escort ke hadapan saya di balai polis yang sama untuk proses pemeriksaan dan saya telah menggunakan 4 test trip untuk dicelup ke dalam botol air sampel air kencing yang diambil, salah satu telah tunjukkan satu garisan coklat pada penanda test trip itu. Ia tunjukkan positif dadah jenis methamphetamine. Kemudian saya tutup botol itu dan seal dengan kertas biru dan tampal dengan label, saya catitkan nama penama pada botol untuk elakkan tertukar …
>
> Selepas seal botol penama balik ke pejabat narkotik IPD KB. Selepas bawa balik ke IPD KB, kemudian report polis. Borang pengesahan pengambilan air kencing diisi di bahagian narkotik IPD KB. OKT ada tandatangan borang ini …
>
> Saya serahkan sampel air kencing kepada IO kes Inp Khairul Azmi. Test strip yang digunakan belum expired, ia masih boleh digunakan. Sebelum test strip digunakan saya telah semak samada boleh digunakan lagi. Masa serahan ada buat borang serahan barang kes.
>
> Saya cam botol kerana ada nama OKT. Seal PDRM dibuat oleh IO kes ini. Keadaan botol masa serahan dalam keadaan baik.

[24] The evidence of SP5 was consistent and he remained unshaken under cross-examination. The following are extracts of his evidence under cross-examination.

Q: Tadi kata tak jumpai barang salah, kenapa kamu bawa OKT ke BP Kok Lanas?

A: Kerana syaki perlu buat urine saringan awal.

Q: Tadi kata botol diambil sendiri, botol dalam sampul silver.

A: Ya.

Q: Siapa yang ambil dan koyak.

A: OKT yang ambil dan saya yang koyakkan.

Q: Kamu yang iringi OKT untuk ambil urine.

A: Tidak.

Q: Siapa yang iringi.

A: 2 anggota serbuan, SM Zabidi dan Det Kop Nazri.

Q: Berapa ramai saspek yang dibuat urine.

A: Saya tak ingat.

Q: Selepas urine diambil, adakah OKT lihat proses teststrip yang dibuat.

A: Ya.

Q: Pada masa itu OKT bawah kawalan siapa.

A: Ada SM Zabidi dan Kop Nazri yang bersama saya, mereka berada di dalam sebuah bilik di BP Kok Lanas. Kami berempat termasuk OKT.

Q: Pada masa ini, yang lain yang ditangkap bersama berada di mana.

A: Di lokap.

[25] SP5's evidence was corroborated by SP1 whose evidence can be found at pp. 33 and 34 of the appeal record:

> Setelah dibawa balik, SI Bustaman (SP5) arahkan saya untuk buat kawalan ke atas OKT untuk diambil sampel air kencing di BP Kok Lanas. Saya bersama Det Kop Nazri buat tugas escort dan kawalan ke atas OKT untuk ambil air kencing. Saya perhatikan OKT kencing dalam botol yang diberi kepada OKT. Botol berada di atas meja dalam BP Kok Lanas. Botol ini disediakan oleh SI Bustamam. Kedudukan saya masa OKT ambil botol adalah bersebelahan dengan OKT. Keadaan botol sebelum diambil oleh OKT adalah tersusun di atas meja. Keadaan botol itu sebelum diambil adalah berkeadaan dalam plastik yang belum dibuka lagi. Plastik berwarna silver. Maksud saya bersusun adalah bungkusan yang belum dibuka dan mengandungi botol disusun di atas meja. Satu bungkusan yang

A mengandungi botol urine diambil sendiri oleh OKT berserta satu borang untuk mengambil air kencing OKT. Borang disediakan oleh SI Bustamam dan diserahkan oleh beliau kepada OKT. Semasa OKT ambil bungkusan itu, bungkusan tersebut belum dibuka. Botol itu tidak boleh dilihat dari bungkusan itu. Bungkusan itu dibuka sendiri oleh OKT dengan membuka bungkusan plastik warna silver. Saya ada di sebelah OKT pada masa itu.
B Botol tersebut masih belum digunakan lagi, ia dipastikan oleh OKT sendiri. OKT sendiri yang keluarkan botol dari bungkusan. Pada pandangan mata saya, botol itu masih belum digunakan lagi. Saya nampak sendiri OKT yang buka bungkusan plastik itu. Apa yang berlaku tadi di dalam pejabat BP Kok Lanas.

C PO: Pohon rujuk borang akuan pemberian.

A: Ya. Ini adalah borang tersebut. Ini yang saya maksudkan. Saya cam borang ini kerana saya berada di sebelah OKT. Saya nampak OKT tandatangan borang ini.

PO: Pohon tanda borang pemberian sebagai P1 dan tandatangan OKT
D sebagai P1A.

PB: Saya tiada bantahan.

Mah: Borang pemberian sebagai P1 dan tandatangan OKT sebagai P1A.

SI Bustamam ada bagitahu OKT tentang tujuan borang tersebut diberikan
E kepada OKT. Saya dengar SI Bustamam bagitahu bahawa borang ini untuk mengambil air kencing dari OKT. OKT setuju untuk berikan air kencing beliau. Saya dengar OKT jawab setuju. Tiada paksaan atau ugutan dari mana-mana pihak pada masa itu.

Seterusnya, saya escort OKT bersama Det Kop Nazri ke tandas BP Kok
F Lanas. Apabila escort OKT ke tandas, borang dan bungkusan silver berada dalam simpanan SI Bustamam.

[26] On the following day, SP6 handed over the bottle containing the urine sample to SP2 who, armed with the urine sample and form POL31 (P6), handed them over to the chemist, SP3 to conduct the "test". The urine
G sample was then analysed by SP3, the chemist, using the Gas Chromatography Mass Spectroscopy method (GCMS), who was assisted by SP4.

[27] The chemist report confirmed that the urine sample of the accused contained methamphetamine, a dangerous drug listed under Act 234. SP3
H and SP4 both confirmed that there was no mix-up of the urine sample of the accused with that of other urine samples whilst under their custody.

[28] This court also agreed with the finding of fact of the Magistrate that the evidence of the prosecution witnesses was reliable and consistent and that there was no break in the chain of evidence regarding the movements of the

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bottle containing the urine sample of the accused/respondent. After subjecting the evidence of the prosecution to strict scrutiny, and upon maximum evaluation, this court was satisfied with the finding of the learned Magistrate that a *prima facie* case was successfully proved by the prosecution.

The Defence

[29] This court had thoroughly perused and critically analysed the defence case. The defence of the accused/respondent was a bare denial. In his defence, the accused/respondent testified that the raid was done in a harsh manner where SP5 pointed a pistol at him. He was arrested by Corporal Nazri and was kicked by him when he failed to give co-operation. At the Kok Lanas Police Station, the accused contended that it was Corporal Nazri who took out the empty urine bottle and handed over to him and not SP5. It was Corporal Nazri who brought and escorted him to the toilet. The accused/respondent also denied that he signed the consent form (borang pemberian – P1) to give his urine sample.

[30] The accused/respondent further testified that the urine sample was given to Corporal Nazri who did the test strip and the screening test and not SP5 and SP1.

[31] The relevant evidence are at p. 98 of the appeal record:

> Semasa di BPKL saya ditahan di lokap BPKL. Semua tahanan dikumpulkan bersama. Kemudian Kop Nazri panggil saya untuk buat ujian air kencing. Dia panggil saya seorang. Kop Nazri keluarkan botol dari begnya dan bagi pada saya untuk ambil urine. Kop Nazri bagi botol sahaja. Botol itu tudung kuning dan plastik lutsinar. Masa ini Kop Nazri yang iringi saya. Dia berada di pintu tandas kemudian saya serahkan pada Kop Nazri. Hanya Kop Nazri yang buat semua itu. Kemudian Kop Nazri arahkan saya ke sebuah bilik. Bilik itu di hadapan Inquiry. Dalam bilik itu ada SI Bustamam dan 2-3 orang lain saya tak kenal. Ada 2-3 orang tahanan sedang bercakap dengan SI Bustaman. Kemudian dia arahkan saya berdiri dekat dinding. Kop Nazri telah buka penutup dan celup test trip ke dalam botol. Kop Nazri kemudian jumpa SI Bustamam. SI Bustamam jumpa saya dan tanya ada ambil apa-apa. Saya jawab tidak. Keterangan SI Bustamam memang bercanggah dengan saya. Kop Nazri yang buat ujian ke atas air kencing saya. SI Bustamam suruh saya cakap betul-betul dan saya berkeras saya tidak ambil apa-apa bahan terlarang. Kemudian SI Bustaman arahkan saya dimasukkan ke lokap. Masa itu dah dekat pukul 7.00 petang dah. Lepas itu SI Bustaman bawa saya ke lokap, sampai malam. Kemudian saya di bawa ke IPD KB. Selepas sampel urine dicelup, saya tak tahu apa yang berlaku selepas itu. Di BPKL saya tak ada tandatangan apa-apa borang.

[32] In order to deny the case against him that there was no mix-up of his urine sample with other detainees, (as it was sealed and labelled at Balai Polis Kok Lanas), the accused/respondent alleged that the mix-up happened at IPD Kota Bharu where the samples of other detainees were taken. This was what he said at p. 99 of the appeal record:

> Ke IPD KB, kami dibawa beramai menaiki trak, masa itu lebih 30 orang yang ada. Bila tiba di IPD KB, saya digari bersama dengan tahanan lain dan saya terpaksa ke tandas untuk ambil sampel urine tahanan lain. Lepas selesai, semua sampel diletak atas meja. Yang digari bersama saya ada lebih kurang 8 orang. Saya balik dari tandas dan sampel urine diletak atas meja dalam bilik operasi narkotik. Tiada anggota seorang pun di situ, jumlah botol tak pasti tapi diaorang letak sekali. Kop Norizan masuk dan arahkan semua pemberi urine ambil semula botol-botol itu masing-masing. Masa itu botol tak ditandakan apa-apa. Saya tak tahu siapa tuan punya botol. Semua botol adalah jenis yang sama. Kop Norizan tulis angka dibotol dan tangan pemilik. Ada satu botol yang tinggal dan Kop Norizan tanya saya. Saya kata saya tak tahu. Dia tanya botol saya dan saya jawab tak tahu. Saya hanya kali terakhir tengok botol saya hanya di BPKL. Kop Norizan tanya pada Kop Nazri. Kop Nazri bagitahu letak atas meja dekat bakul botol urine. Kop Norizan ambil dan seal botol itu dengan tanda biru dan letak nama saya. Di BPKL tak ada apa-apa sebarang catitan dan tandaan. Botol yang ditunjukkan pada saya di IPD KB juga tiada sebarang tanda. Kop Norizan lekatkan botol itu dengan pelekat biru dan tanpa ditulis dengan nama saya.

[33] After scrutinising the grounds of judgment of the learned Magistrate so far as the defence was concerned, this court found that the Magistrate erred when he grounded his judgment based on the existence of contradictions of the defence evidence with that of the evidence of the prosecution witnesses to acquit the accused/respondent at the end of the defence case. The learned Magistrate in his brief reasoning said at p. 22 of the appeal record:

> [13] Mahkamah mendapati bahawa versi keterangan OKT adalah sangat berbeza dengan versi keterangan yang dikemukakan oleh saksi-saksi pendakwaan terutamanya keterangan SP1, SP5 dan SP6. Sepertimana yang mahkamah nyatakan di atas bahawa ketiga-tiga saksi ini adalah saksi-saksi yang material. Terdapat ketidaksamaan versi antara versi OKT dan saksi-saksi pendakwaan ini terutamanya ketika berlakunya proses tangkapan OKT, ketika mana proses pengambilan ujian awal sampel air kencing OKT termasuk prosedur-prosedur pegambilan urine, sehingga proses penandaan dan "seal" botol urine yang dilakukan oleh pihak polis terhadap tahanan termasuk OKT.
>
> Atas sebab itu pelbagai kemungkinan boleh berlaku …

[34] It is trite that in almost all cases, the evidence of the defence would be significantly different from that of the prosecution. Put it in another manner, the defence evidence will invariably be in contradiction with that

of the prosecution, for if they were the same, it will give rise to the defence affirming the prosecution's case and thus resulting in the success by the prosecution in proving a case beyond reasonable doubt against the defendant.

[35] It will be different had the evidence of the prosecution witnesses contradict significantly with those of other prosecution witnesses, as depending on the circumstances of the case and the totality of the evidence, that will be fatal resulting in the collapse of the case of the prosecution against the accused.

[36] Hence, it was manifestly clear that the Magistrate fell into error when he grounded his finding to acquit and discharge the accused based solely on the contradicting evidence of the defence with that of the prosecution. Such contradictions in themselves could not and will never result in the accused/respondent being able to raise a reasonable doubt on the prosecution's case.

[37] In fact, the learned Magistrate failed to take into consideration that a proper approach would be that at the end of the defence case, the Magistrate must subject the evidence of the prosecution to a maximum evaluation (see *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457). Thereafter, he has to test the defence evidence with that of the evidence of the prosecution to determine which evidence was more probable and to finally determine whether that probability can raise a reasonable doubt on the case of the prosecution in accordance with the well-established principle laid down in *Mat v. PP* [1963] 1 LNS 82; [1963] MLJ 263 (see also the case of *PP v. Mohd Rosidi Mat Amin* [2015] 6 CLJ 511; *Prasit Punyang v. PP* [2014] 7 CLJ 392). In this case, it was patently clear that the Magistrate did not direct his mind in accordance with the well-established principle, hence giving rise to a misdirection which warranted the intervention of this court.

[38] The Magistrate had made various other findings of facts including the credibility of the prosecution witnesses when he said "the evidence of the prosecution witnesses are rational, reasonable, and consistent at the prosecution stage."

[39] Had the Magistrate analysed critically by weighing in on the evidence of the accused with that of the prosecution's witnesses, he would have maintained his earlier finding at *prima facie* stage that the prosecution witnesses were reliable and consistent, and hence the version of the prosecution was more probable, therefore rendering the failure of the accused/respondent to raise a reasonable doubt on the prosecution's case.

[40] Guidance on this method of analysis can be found in the case of *PP v. Mohd Bandar Shah Nordin & Anor* [2008] 4 CLJ 859; [2008] 4 MLJ 556 where the Court of Appeal said "in approaching issues of credibility it is always necessary to bear in mind the tests that a trier of fact should ordinarily apply when evaluating oral evidence. One of the tests is motive. The

presence or absence of motive on the part of a witness is a relevant consideration which a trial court should take into account. Another relevant consideration is probabilities of the case. If the witness evidence is improbable, this would be a good reason for rejecting his evidence or according it with little weight".

[41] It was obvious here that the evidence of the accused/respondent was not probable as compared to the strong overwhelming evidence adduced by the prosecution. Furthermore, the accused/respondent had all the motive to lie in court compared to the prosecution witnesses who were made up of police personnel and had no personal interest whatsoever. The accused/respondent's motive was only to blacken their credibility as much as possible in order to earn an acquittal. The learned Magistrate misdirected his mind when he failed to take this factor into consideration. In fact, the learned Magistrate had earlier made a finding that:

> Begitu juga SP5 selaku pegawai serbuan tidak pernah mengenali OKT sebelum ini. Oleh itu tiada sebab untuk SP5 menganiayainya dan mengkhianati OKT. Tiada motif untuk SP5 berbuat demikian terhadap OKT.

Thus, the Magistrate had contradicted his earlier finding on this fact which gave rise to a misdirection which warranted appellate interference.

[42] In addition, the learned Magistrate failed to consider in totality the defence of bare denial of the accused which he erroneously found had shaken the evidence of the prosecution witnesses. The accused in his evidence had denied all the evidence adduced by SP5. Instead the accused had made several allegations such as that SP5 and SP1 had brandished the pistol at him; and that he was kicked by Nazri; that it was Corporal Nazri who had done the screening test and not SP1 and SP5; that there was a mix-up of urine samples at IPD Kota Bharu, of which some were afterthoughts as they were raised only in the defence case. It is trite that such defence of afterthought will undermine the case for the accused significantly (see *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 and the case of *Wong Swee Chin*).

[43] A mention must be made that the learned Magistrate agreed that an adverse inference under s. 114(g) of the Evidence Act 1950 should be invoked against the prosecution for failing to call Corporal Nazri who escorted the accused/respondent, together with SP1, to take the urine sample. This court found it was unnecessary to invoke the said section, as if Corporal Nazri were to be called, his evidence will be the same as that of SP1. What is more, the Magistrate had already satisfied himself at the prosecution's case that the ingredients of the charge were already made out, even without calling Nazri. Thus, this court agreed with such finding, as this court was satisfied that there was no gap in the case of the prosecution as it

had called all the relevant witnesses to disclose the narratives of the case from the time the urine sample of the accused was taken (which was later established as not being mixed up with other urine samples) till the time the urine sample was analysed and, thereafter taken into safe custody of the IO. On that ground, this court found that the learned Magistrate erred when he wrongly invoked an adverse inference against the prosecution.

[44] Looking at the case in totality, the defence of the accused was a bare denial which cannot dislodge the overwhelming evidence of the prosecution against the accused/respondent. In the final analysis, this court found that the accused/respondent failed to raise a reasonable doubt in the case of the prosecution and therefore the prosecution had successfully proved its case beyond reasonable doubt. The accused/respondent was found guilty and convicted. Accordingly, the decision of the Magistrate was set aside.

Questions Of Law

[45] This court will now discuss the questions of law posed, firstly, whether the taking of the urine sample of the accused in this case was in accordance with the procedure and the existing law.

[46] As discussed earlier, this court had made a finding of fact that the procedure used was right, and that there was no break in the chain of evidence. The test used was firstly, the screening test and, secondly the "clinical test or confirmation test" ie, analysis by the chemist. In this case the same urine sample was subjected to both tests that is from one and the same bottle of urine sample.

[47] This court takes cognisance of the latest judgment of the Court of Appeal decided on 22 February 2017 in *Noor Shariful Rizal Noor Zawawi v. PP* [2017] 4 CLJ 434 in which it was decided that two separate urine samples in two separate bottles are to be used for each test as this was in conformity with two administrative guidelines ie, the IGSO F103 item 8 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 and KKM Guidelines Bilangan 6/2002, which the Court of Appeal in that case decided that the two administrative directives have the force of law.

[48] In deciding that those directives/standing orders are binding, the Court of Appeal said at p. 450:

> [50] The appellant was deprived of the procedural law which gives him of the right of a second test – confirmation test. The Magistrate and learned JC, by ruling that one bottle of the appellant's urine sample was sufficient, was contrary to the IGSO F103 and the KKM Guidelines Bilangan 6/2002. The appellant, accordingly, did not have a fair trial and Articles 5(1) and 8(1) were violated. The appellant did not get what the procedural law said he should get. He had lost a chance of being acquitted which was reasonably opened to him. Thus justice has been miscarried – commonly called "miscarriage of justice". Justice is justice in accordance

A with law as enshrined in Articles 5(1) and 8(1) of the Federal Constitution. The High Court case of Australia in *Mraz v. The Queen* [1955] 93 CLR 493 was referred to by Gopal Sri Ram FCJ in *Lee Kwan Woh, supra*, where Fullagar J said at p. 514 in the following terms:

> ... every accused person is entitled to a trial in which the relevant law is
B correctly explained to the jury and the rules of procedures and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly opened to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according
C to law.
>
> [51] Having considered the issues of law raised, the facts and the circumstances of this case, we were unanimous that the appellant's conviction was erroneous and not safe. We allowed the appellant's appeal and set aside his conviction and sentence. The appellant was accordingly
D acquitted and discharged.

[49] Whilst this court was bound by the latest decision of the Court of Appeal but this court was of the considered opinion that this decision does not bind the instant case as it was heard earlier on 20 December 2015 before the decision of the Court of Appeal in *Noor Shariful Rizal* on 22 February
E 2017.

[50] In the same vein, the offence in the instant case was committed on 30 October 2013 well before the *Noor Shariful Rizal* decision was made ie, 22 February 2017.

F **[51]** Further, this court was of the opinion that the *Noor Shariful Rizal* decision does not have a retrospective ruling but applies prospectively for the reason that, if it were to have a retrospective effect, all the convictions or acquittals before the *Noor Shariful Rizal* case would become a nullity and this would cause chaos in the justice system. In arriving at its decision, this court adopted the ruling of the then Supreme Court in the case of *PP v. Dato' Yap*
G *Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311 where it was held:

> and that the doctrine of prospective overruling would be applied so as not to give retrospective effect to the declaration made with the result that all proceedings of **convictions and acquittals** which had taken place under
H the section prior to the date of the judgment in this matter would remain undisturbed and not be affected. (emphasis added)

[52] The ruling in *Dato' Yap Peng* was applied by the court in the case of *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740; [1997] 3 MLJ 681 in which it was held:

I

> … it would be a manifest injustice to render retrospective ruling on the invalidity of the two impugned sections. The declaration as to invalidity shall therefore, be prospective only and shall include only the present case and cases registered from the date of the ruling.

[53] In addition, this court was also of the considered opinion that if the Court of Appeal in *Noor Shariful Rizal* case had wanted its ruling to be retrospective, it would have so mentioned in clear terms as pronounced in the Supreme Court case of *Mamat Daud & Ors v. The Government of Malaysia* [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197; [1998] 1 MLJ 119 where it was held:

> … The ruling shall not apply to the Federal Territories of Kuala Lumpur and Labuan and it is to take effect from the date of the order, that is October 13, 1987 …

[54] The other question of law posed was whether this court could impose a sentence without any record of conviction. It is trite that a High Court in an appeal, and after satisfying itself that the order of acquittal by a lower court was wrong, will have to substitute the acquittal, and to record a conviction. It is only upon a conviction that a sentence is to be passed.

Sentence

[55] The accused/respondent filed an appeal to the Court of Appeal on sentence. The Public Prosecutor did not cross-appeal on the inadequacy of sentence.

[56] In mitigating for a lenient sentence, learned counsel submitted before this court that the accused/respondent was a police personnel for 14 years before he was suspended from service following this charge against him. The accused/respondent also did not have any criminal record ie, he is a first offender. The accused/respondent had an excellent service record, received various awards, and that he loves his job.

[57] The accused also mitigated that he regretted his act and was remorseful, and pledged that he will not get involved in any wrongdoings in future, including committing this offence. The accused/respondent mitigated that as he comes from a low-income family, has two young children, one of whom is a newborn, and being the sole breadwinner, he prayed that no custodial sentence be meted out and instead a bound over for good behaviour under s. 173A of the Criminal Procedure Code or a fine of below RM2,400 (his present pay) be imposed.

[58] The learned DPP on the other hand submitted that a deterrent sentence should be imposed in view of the rampancy of this offence in Kelantan, and to show public abhorrence to this offence. Further, public interest warrants that offenders must be dealt with severely.

[59] The learned DPP further submitted, as the accused/respondent was a policeman, he should know the law, and should not have taken this "evil path" and to show good example to the public.

[60] This court had considered the submissions by both parties and took cognisance that before passing sentence that public interest consideration is of paramount importance over the interest of the accused – see *R v. Ball* (1951) 35 CR App 164 and *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256. Nevertheless, the interest of the accused should not be disregarded (see *Tan Sri Abdul Rahim Mohd Noor lwn. PP* [2001] 1 CLJ 645; [2001] 1 MLJ 193). There are circumstances in which public interest warrants that the accused should not be put behind bars, or if put behind bars, it should not be too long as that will do more harm than good.

[61] Hence, the court had to strike a balance in order to do justice to the accused and to the public. This court had embarked on a balancing exercise, by balancing the public interest with the factors that the accused is young, a sole breadwinner, has two small children, one of whom is a newborn, and that both children need the fatherly love and affection, a first offender, who had served in the police force for 14 years and had been awarded with various awards.

[62] Thus, this court was of the considered opinion that neither a bound over for good behaviour under s. 173A of the CPC nor a custodial sentence should be the option, but in the circumstances of this case, a fine is most appropriate. This court had imposed a sentence of fine of only RM3,500 and in default eight months imprisonment. However, this court inadvertently did not pronounce the requirement of police supervision.

[63] In spite of the decision of this court, the accused/respondent was still not satisfied with the decision and appealed against this decision. This court was of the considered opinion that the sentence meted out, in the circumstances of the case, was fair and safe as this court had considered all the sentencing principles and had taken all factors into account particularly the personal interest of the accused, and also the public interest.

[64] The accused/respondent should have considered himself fortunate as the sentence imposed was a non-custodial one ie, merely a fine. The accused/respondent must appreciate the sentencing trend for this offence meted out by the trial courts in Kelantan as follows:

(a) In the case of *PP v. Mohd Yusri bin Yasin* (83D-615-06-17) upon pleading guilty, the accused was sentenced by the Tanah Merah Magistrate's Court to 13 months imprisonment and two years of police supervision.

(b) In the case of *PP v. Mohamed Syukri* (83D-614-12-16), upon pleading guilty, the Kuala Krai Magistrate's Court imposed a sentence of five months imprisonment and two years of police supervision.

(c) In the case of *Amelia bt Mohd Rafi* (83D-1505-07-17), upon pleading guilty, the Kota Bharu Magistrate's Court imposed a sentence of six months imprisonment and two years of police supervision.

[65] This court took cognisance that each case would be judged based on the peculiar circumstances of each case. In that regard, this court opined that the sentence imposed on the accused/respondent was not manifestly excessive but a fair and safe one.

Conclusion

[66] Having considered all the evidence and submissions before this court as laid down above, thus this court allowed the appeal of the Public Prosecutor and found the accused/respondent guilty and convicted him and sentenced him to a fine of RM3,500 in default eight months imprisonment. The order of the Magistrate was accordingly set aside.